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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]
SRC 01 048 51649

Office: TEXAS SERVICE CENTER

Date: NOV 26 2004

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly and
invasion of personal privacy

DISCUSSION: The Director, Texas Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a pastor. The director determined that the petitioner had not established: (1) that the beneficiary had the requisite two years of continuous work experience as a minister immediately preceding the filing date of the petition; (2) its ability to pay the beneficiary's proffered wage; or (3) the purpose of the beneficiary's previous entry into the United States.

On appeal, the petitioner submits a brief from counsel and various exhibits, some previously submitted. Several months later, the petitioner has submitted a letter from the Board of Missions of the Cumberland Presbyterian Church. This letter consists largely of general information, and it contains nothing to rebut or overcome any of the stated grounds for revocation. Furthermore, there is no statutory or regulatory provision to allow a petitioner an indefinite, open-ended period of time to supplement the record.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Esteime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

- (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on November 30, 2000. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a pastor throughout the two years immediately prior to that date.

[REDACTED] of the petitioner's business committee, states that the beneficiary "has been serving as the pastor of our church since July 28, 2000." Thus, the beneficiary's work for the petitioner accounts for only the last four months of the 2-year qualifying period. [REDACTED] president of the [REDACTED] [REDACTED] states that the beneficiary "has been serving as a chaplain at the [REDACTED] [sic] and prayer [REDACTED] since January 13, 1999." The letter is dated May 30, 2000. Thus, this letter does not cover the period from November 30, 1998 to January 12, 1999, or from May 31, 2000 to the date the petitioner employed the beneficiary. Furthermore, the petitioner has not shown that the duties of a camp chaplain are essentially similar to those of a church pastor. An unsigned letter, attributed to the beneficiary himself, discusses other positions that the beneficiary is said to have held until July 1998. These positions all fall entirely outside the qualifying period.

The evidence described above, on its face, fails to account for the beneficiary's religious work for over three months of the qualifying period, and it does not indicate that the beneficiary worked as a pastor for more than four months of that period.

The director issued a notice of intent to revoke, stating "no evidence has been submitted to support that the beneficiary has been in a paid position for the two years preceding filing of the I-360 petition." The director requested copies of the beneficiary's tax returns to show that the petitioner has paid the beneficiary.

In response to the notice, counsel states that the beneficiary "worked full-time as a senior pastor in Korea until his arrival in the U.S. in the second half of 1998," and that the beneficiary's "R-1 authorized employment in the United States began in January 1999." Counsel has thus stipulated that the beneficiary did not work during the first months of the 1998-2000 qualifying period.

The petitioner submits a copy of the beneficiary's tax returns. The 2001 and 2002 returns are actually amended returns, prepared *after* the issuance of the notice of intent to revoke. The beneficiary reported his payments from the petitioner as "Profit from Business." The beneficiary also reported income from a "Janitorial Service" in 1999 and 2000.

The director, in revoking the petition, noted that the beneficiary essentially reported his income as a contractor, rather than as an employee of the petitioning church. This, however, is not a disqualifying factor. The record demonstrates that the petitioner paid the beneficiary for services rendered. The exact arrangement by which these payments were made and reported is not relevant to the question of whether the beneficiary provided those services. We note that the Schedule SE, intended for self-employed taxpayers, acknowledges that an individual completing the form may be "a minister, member of a religious order, or Christian Science practitioner." It appears that it may be a common arrangement for a minister to be considered self-employed rather than an employee of the church.

_____ indicates that the petitioning church "was begun in the fall of 1999 as a Cross Cultural _____ at which time the beneficiary "was received into the Presbytery as an Ordained _____ Under the Provisional Status he was to be mentored and complete some educational courses about the _____. He has since been removed from Provisional Status and is now an ordained minister in good standing in our Presbytery." The director concluded that the beneficiary was not a fully authorized minister for much of the qualifying period. The record, however, does not indicate that the beneficiary's duty or authority were in any way limited during his provisional status. Rather, that status appears to have been related to the absorption of the new church into the denomination. This information may raise questions about the beneficiary's prior membership in the petitioning denomination, as required by 8 C.F.R. §§ 204.5(m)(1) and (3)(ii)(A), but the beneficiary's provisional status does not appear to have interrupted his work as a pastor. That being said, there are other, unrelated grounds to support the finding that the beneficiary lacks the required experience, some of which we have already discussed.

The director, in the notice of revocation, noted the gaps in the beneficiary's documented employment, as well as the beneficiary's reported income from a janitorial service. On appeal, counsel contends that the beneficiary "was employed by the _____ starting August 19, 1998. See attached letter from the Asian Ministries Division" (emphasis in original). The letter in question is, itself, dated August 19, 1998, and therefore the letter cannot confirm anything said to have happened after that date. It indicates that the beneficiary "will preach the Gospel" at the camp, but it does not indicate that the beneficiary had already begun to do so. A camp official had previously stated that the beneficiary "has been serving as a chaplain . . . since January 13, 1999." Counsel's new claim that the beneficiary worked at the camp between August 1998 and January 1999 is entirely unsubstantiated. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We note that even counsel's own previous discussions of the beneficiary's experience make no mention of this newly claimed period of employment.

Counsel also asserts that "[p]rior to his I-360 [petition], [the beneficiary] maintained constant R-1 [nonimmigrant] status in excess of two years." This is simply not true; the beneficiary's R-1 status commenced in January 1999, less than two years before the November 2000 filing date. The beneficiary was in the United States prior to January 1999, but as a B-2 nonimmigrant visitor, not as an R-1 religious worker. Also, as noted above, the petitioner has not shown that the beneficiary's duties as a camp chaplain were largely the same as his subsequent duties as pastor of the petitioning church.

Counsel, on appeal, does not address the beneficiary's reported income for "janitorial services" in 1999 and 2000. In *Matter of B*, 3 I&N Dec. 162 (CO 1948), in a discussion of whether an alien worked continuously as a minister, one consideration was that the alien did not take up any other occupation or vocation. The beneficiary's janitorial work is interruptive of *continuous* work as a minister.

Based on the available evidence, we affirm the director's finding that the petitioner has not established the beneficiary's continuous experience as a minister during the qualifying period.

The next issue concerns the petitioner's ability to pay the beneficiary's salary. [REDACTED] that the beneficiary's "salary will be \$2500 per month along with health insurance, housing and gas benefits." The proffered monthly salary annualizes to \$30,000 per year, not including other benefits. Thus, the petitioner's total expenses on the beneficiary's behalf would considerably exceed \$30,000 annually.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's 2001 budget includes only \$20,000 for the "Senior pastor." Given that the senior pastor is the only person budgeted to receive any compensation, it appears that the beneficiary is that individual. If the beneficiary is the senior pastor, then the petitioner's budget falls \$10,000 short of the beneficiary's annual salary, and the budget does not show sufficient excess funds to cover the shortfall. If the beneficiary is not the senior pastor, then the petitioner has not budgeted for the beneficiary's salary at all.

A separate document indicated that the petitioner projected, for 2001, \$21,630 in base salary, \$7,416 in housing allowance and \$7,000 in medical insurance. The 2001 budget lists \$7,500 for "insurance" of an unspecified nature, and no housing allowance at all. The petitioner does not explain why the two documents do not agree.

The petitioner's initial submission includes copies of several bank statements, all in the name of "Cumberland Presbyterian Church NCD." [REDACTED] stated clerk of the [REDACTED] of the Cumberland [REDACTED] states that the petitioner "is a New Church Development of the Cumberland [REDACTED] and is supported financially by our denomination and by our Presbytery." The "NCD" printed on the bank statements appears to stand for "New Church Development." Many, but not all, of the bank statements, show monthly checks for \$2,500 or biweekly checks for \$1,250 each. Some months show only one \$1,250 payment each. The bank statements did not identify the recipient of the checks.

In the notice of intent to revoke, the director noted that the bank statements are not in the petitioner's name. The director apparently did not take into account the letter indicating that the Cumberland Presbyterian Church supports the petitioning church. The director requested additional evidence to establish the petitioner's ability to pay the beneficiary's salary.

In response to the notice, the petitioner reiterates that the [REDACTED] provides financial support. The petitioner submits copies of the checks listed in the above bank statements, showing that they were issued to the beneficiary. The checks to the beneficiary are, for the most part, consecutively numbered, indicating that the account was used primarily for payments to the beneficiary. The checks show that the petitioner has sometimes, but not always, paid the beneficiary at the proffered rate of \$2,500 per month.

The checks reproduced in the petitioner's response show that "Cumberland [REDACTED] paid the beneficiary the proffered wage from May 2000 to November 2001. Following that time, the checks are for slightly larger amounts, but they do not establish regular payments. There is only one documented payment to the beneficiary between mid-November 2000 and mid-March 2001. Check 1027, for \$1,800, was issued to the beneficiary in May 2001. The beneficiary received check 1036 in April 2002. In the intervening eleven months, only eight checks (1028-1035) were drawn on the account, and there is no evidence to show how many, if any, of those checks were paid to the beneficiary.

The petitioner submits an "Income Statement . . . Summary of Year 2000 to May 31st, 2003," showing income and expenditures by year. This document indicates that the petitioner paid \$30,000 in salaries in 2000; \$21,600 in 2001; and only \$12,000 in 2002. The amount for 2002 is only 40% of the beneficiary's proffered wage, assuming that the beneficiary received the entire amount. The petitioner's claimed net income for 2002 was \$2,052. Even if the beneficiary had received the entire net income, the total would be less than half of the proffered wage. For the first five months of 2003, the petitioner claimed to have paid \$5,000 in salaries, with \$115 in net income. The only year in which the petitioner claimed to have paid \$30,000 in salaries was 2000. The statement shows a decline in income from 2000 onward.

The beneficiary's tax returns show that the church paid him \$30,000 in 2000, but lesser amounts in later years. In conjunction with the above income statements, the documentation presents *prima facie* evidence that the petitioner has *not* consistently paid, or been able to pay, the beneficiary's proffered wage of \$2,500 per month, or \$30,000 per year.

On appeal from the revocation of the petition, counsel asserts that the petitioner "is capable of paying the wage proffered to [the beneficiary] and has, in fact, fully supported and compensated the beneficiary. . . . Evidence submitted established that the church has been compensating [the beneficiary] at the agreed upon rate, plus benefits." The petitioner submits copies of statements from the petitioner's own bank account (as opposed to the [REDACTED] account which has actually furnished the beneficiary's paychecks). These statements are more recent than the statements submitted earlier. As detailed above, the evidence submitted shows a *decline* in payments to the beneficiary. If, as counsel now claims, the petitioner has always been able to pay the beneficiary \$30,000 per year, then the petitioner has failed to explain why it paid the beneficiary substantially less than that amount in 2001 and 2002. Counsel's claim that the beneficiary has consistently received the full wage is contradicted by the petitioner's own submissions.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). While payment of the full salary is, obviously, strong evidence of the petitioner's ability to pay that salary, in this instance the beneficiary has apparently received only a fraction of that salary. We

therefore affirm the director's finding that the petitioner has failed to establish its ability to pay the beneficiary's proffered wage of \$30,000 per year.

The final issue raised in the director's decision concerns the beneficiary's entry into the United States. Section 101(a)(27)(C)(ii)(I) of the Act, 8 U.S.C. § 1101(a)(27)(C)(ii)(I), requires that the alien seeking classification "seeks to enter the United States . . . solely for the purpose of carrying on the vocation of a minister." In this instance, the director concluded that the petitioner had failed to establish that the beneficiary entered the United States solely for the purpose of working as a minister. The director cited no evidence or argument to support this conclusion.

This finding is not defensible. The AAO interprets the language of the statute, when it refers to "entry" into the United States, to refer to the alien's intended *future* entry *as an immigrant*, either by crossing the border with an immigrant visa, or by adjusting status within the United States. This is consistent with the phrase "*seeks to enter*," which describes the entry as a future act. While the beneficiary's janitorial work raises other issues, already discussed, the beneficiary reported no janitorial income after 2000, and there is no evidence that the beneficiary has continued in that work since then, or that he intends to continue or resume providing janitorial services. We therefore withdraw this particular finding by the director.

Notwithstanding the withdrawal of the director's finding regarding the beneficiary's entry into the United States, we affirm the director's other findings, which are sufficient grounds for denial or revocation of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.